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December 4, 1996

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

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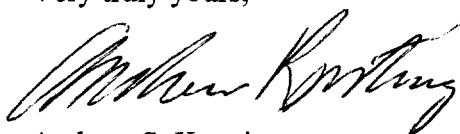
Re: Petition for Rulemaking to Allot
Channel 49 to New Albany, Indiana

Dear Mr. Caton:

Transmitted herewith on behalf of Fant Broadcast Development, L.L.C, are an original and four copies of a Petition for Reconsideration in the above-referenced matter.

Should any questions arise concerning this matter, please communicate directly with the undersigned.

Very truly yours,



Andrew S. Kersting
Counsel for
Fant Broadcast Development, L.L.C.

Enclosure

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BEFORE THE

Federal Communications Commission

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In the Matter of)
)
Amendment of Section 73.606(b) of the) MM Docket No. _____
Commission's Rules, TV Table of Allotments,) RM No. _____
to allot Channel 49 to New Albany, Indiana)

To: Chief, Allocations Branch

PETITION FOR RECONSIDERATION

Fant Broadcast Development, L.L.C. ("Fant"), by counsel, and pursuant to Section 1.429 of the Commission's rules, hereby requests the Chief, Allocations Branch ("Chief"), to reconsider his letter dated November 4, 1996 ("*Letter Ruling*"), dismissing Fant's Petition for Rulemaking in the above-captioned matter as "unacceptable for consideration." In support of this petition, the following is stated:

I.

Introduction

On July 23, 1996, Fant filed a Petition for Rulemaking ("Petition") seeking the allotment of Channel 49 to New Albany, Indiana, as that community's first local television service. In his *Letter Ruling*, the Chief dismissed Fant's Petition as unacceptable for consideration because the proposed allotment does not comply with the minimum distance separation requirements of Section 73.610(b) of the Commission's rules. The Chief based his determination on the fact that the "center city" reference coordinates of New Albany, Indiana, are 24.5 kilometers short-spaced to the licensed site

of Station WDRB-TV, Channel 41, Louisville, Kentucky, and 37.9 kilometers short-spaced to the licensed site of Station WIPB(TV), Channel 49, Muncie, Indiana. The Chief also concluded that the case precedent relied on by Fant in support of its Petition was “irrelevant” because each of the cases involved post allotment requests, and, thus, were based on the reference coordinates of the applicant’s proposed transmitter site, rather than the reference coordinates of the community. *Letter Ruling* at 2.

The Commission’s general policy of applying the center city reference coordinates of the proposed community in evaluating petitions to amend the Television Table of Allotments is set forth in *Amendment of Section 3.606 of the Commission’s Rules and Regulations*, 41 FCC 148, 180 (1952) (“*Sixth Report and Order*”). However, the Chief erred in denying Fant’s request for waiver of the Commission’s general policy and the mileage separation provisions of Section 73.610 because, as demonstrated in Fant’s Petition and accompanying “Request for Waiver of ATV Freeze” (“ATV Waiver Request”), a waiver of the Commission’s policy and mileage separation requirements in this case would provide substantial public interest benefits which outweigh the Commission’s interest in “preserving the integrity of the Table of Allotments and the mileage separation criteria upon which the Table is based.” *See Letter Ruling* at 2.

As demonstrated in Fant’s Petition, if the Commission were to use the reference coordinates of Fant’s proposed transmitter site (rather than the center city reference coordinates), the resulting short-spacings to the vacant Channel 48 allotment at Owensboro, Kentucky, and co-channel Station WIPB(TV), Muncie, Indiana, would be 1.0 kilometers and 0.2 kilometers, respectively. Both of these short-spacings are well within the range of what the Commission has approved in the past. *See, e.g., Sarkes Tarzian, Inc.* 6 FCC Rcd 2465 (1991) (waiver granted where proposed site was 8.3

miles short-spaced); *Clay Broadcasting Corp.*, 51 RR 2d 916 (1982) (5 mile short-spacing approved). Thus, the only issue is whether the Chief should not have applied the reference coordinates of the proposed community when there are substantial public interest benefits that will result from a grant of Fant's Petition and concomitant waiver request. Even assuming, *arguendo*, the Chief did not error in doing so, Fant submits that it was well within the Chief's discretion not to apply the reference coordinates of the community in this instance. Accordingly, Fant asks the Chief to reconsider his prior decision and determine that the public interest would be better served here by granting a waiver and applying, instead, the reference coordinates of Fant's proposed transmitter site.

II.

The FCC Has a Long History of Waiving Its Mileage Separation Requirements in Order to Foster the Development of National Networks

In Docket No. 13340, the Commission instituted a rulemaking proceeding in an effort to find a means of alleviating the need for additional channel assignments in the larger television markets in order to foster the development of a nationwide competitive television system. The Commission concluded that the most efficient means of accomplishing its objective would be to permit, under limited circumstances, channel assignments at substandard spacings subject to the requirement that the new stations provide protection to the existing short-spaced stations to assure they would not receive interference in excess of the amount they otherwise would receive from a co-channel station operating with maximum facilities at full mileage separation. Accordingly, the Commission designated ten markets in which such a "squeeze in" procedure would be considered. *Interim Policy on VHF Television Channel Assignments* in Docket No. 13340, 21 RR 1695 (1961), *recon. denied*,

21 RR 1710a (1961) (“*Interim Policy*”). Many of these proposals, as well as those which arose out of the Commission’s *Interim Policy*, involved a third VHF commercial allotment in a market which was designed to provide a third competitive network outlet. See, e.g., *Grand Rapids, Michigan*, 21 RR 1737 (1961) (a second VHF channel for Grand Rapids and a third for the Grand Rapids - Kalamazoo market); *Rochester, New York*, 21 RR 1748a (1961); *Syracuse, New York*, 21 RR 1754 (1961).

The Commission later extended its policy of waiving its spacing provisions in appropriate circumstances to permit “move-in” applications. In *New Orleans Television Corp.*, 23 RR 1113, 1115 (1962), Station WVUA-TV, New Orleans, filed an application to move closer to its community of license to a site 30 miles short-spaced to co-channel Station WJTV, Jackson, Mississippi. Station WVUA-TV requested a waiver of the mileage separation requirements and proposed to provide equivalent protection to Station WJTV. Upon review, the Commission noted that its long-standing policy of fostering the development of “at least three” competitive television networks had often been frustrated by its inability to assign a third competitive commercial VHF channel. *Id.* at 1115. The Commission also acknowledged its commitment to consider substandard mileage separations in appropriate circumstances in order to alleviate the need for additional VHF assignments in major markets and thereby foster a competitive nationwide television system. *Id.* at 1116. In granting Station KUVA-TV’s application, the Commission concluded that by assuring the existence of a third competitive station in New Orleans, the benefits extended not only to the viewing public of that city, but, ultimately, the entire nation due to its effort to promote a third national network. *Id.* at 1117.

Similarly, in *Television Broadcasters, Inc.*, 4 RR 2d 119 (1965), Station KBMT(TV) (ABC), Beaumont, Texas, sought to move its transmitter approximately 34 miles north of its existing site

to a location which was 18.8 miles short-spaced to co-channel Station KSIA-TV, Shreveport, Louisiana. The applicant proposed to provide equivalent protection to KSIA-TV by directionalizing away from the short-spaced station, and requested a waiver of Section 73.610 of the rules. *Id.* at 121. In support of its request, KBMT alleged that, from its existing site, it could not effectively compete with the local CBS and NBC affiliates which served essentially the same area, and was operating at a substantial loss.¹ *Id.* at 121. KBMT contended that grant of its application would enhance its competitive position as well as that of ABC vis-a-vis the other stations and networks in the market, and would provide its coverage area with a third competitive network television service. *Id.* at 123. In granting KBMT's application and accompanying request for waiver of Section 73.610, the Commission stated:

While it is neither our purpose nor function to assure competitive equality in any given market, we have a duty at least to take such actions as will create greater opportunities for more effective competition among the networks in major markets.

Id. at 123, citing *Peninsula Broadcasting Corporation*, 3 RR 2d 243 (1964).²

¹ The Commission found that there was a substantial disparity in the advertising rates between KBMT and the other network affiliates in the market. *Id.* at 123.

² In *Peninsula Broadcasting*, the applicant alleged that a grant of its application was warranted in order to provide three competitive network services in the Norfolk market. In granting the application and the applicant's accompanying spacing waiver request, the Commission stated:

The Commission has long been concerned with the problem of making three truly competitive network services available to the public in major markets and where the opportunity is presented to achieve this objective without detriment to anyone and with benefit to many, we think that it is clear that a grant of the application would be warranted.

3 RR 2d at 248.

Furthermore, in *Petition for Rule Making to Amend Television Table of Assignments to Add New VHF Stations in the Top 100 Markets and to Assure that the New Stations Maximize Diversity of Ownership, Control and Programming*, 81 FCC 2d 233 (1980) (“*VHF Top 100 Markets*”), *recon. denied*, 90 FCC 2d 160 (1982), the Commission granted requests for waiver of Section 73.610 to permit the allotment of new short-spaced VHF assignments to Charleston, West Virginia; Johnstown, Pennsylvania; Salt Lake City, Utah; and Knoxville, Tennessee. These allotments were subject to the condition that the new station provide equivalent protection to the existing station to which it is short-spaced. *Id.* at 234.

In granting the petitioners’ waiver requests, the Commission recognized that the four VHF drop-ins represented a significant departure from past Commission practice.³ Nevertheless, the Commission concluded that the new VHF allotments would serve important public interest objectives such as providing new local service, the promotion of additional networks, and increased competition in advertising markets. The Commission found these to be substantial contributions to the public interest. *Id.* at 253. Moreover, on reconsideration, the Commission observed that application of the mileage separation rules would achieve a result contrary to the public interest by preventing new and needed television services, and that waiver of the rules would not undermine the policy behind them as set forth in the *Sixth Report and Order*, *supra*.

³ Despite the Commission’s *Interim Policy*, there had been no short-spaced VHF allotments in the continental United States prior to its decision in *VHF Top 100 Markets*. *Id.* at 239.

III.
Grant of the Petition and Request for Waiver of Section 73.610
of the Commission's Rules Will Provide Substantial Public Interest
Benefits Which Outweigh the Commission's Interest in
Applying Its General Allotment Policy

Fant's Petition and request for waiver of the spacing requirements of Section 73.610 of the rules will provide the same, if not greater,⁴ public interest benefits which the Commission previously has found sufficient to justify a waiver of its mileage separation requirements. As indicated in Fant's ATV Waiver Request, the Petition and contemporaneously-filed application for a new television station at New Albany, Indiana, are part of a series of coordinated filings consisting of approximately 20 rulemaking petitions and 40 applications for new television stations, many of which propose a first local television service. These rulemaking petitions and accompanying applications encompass many of the top 100 television markets in which there are no full power stations available to affiliate with The WB Television Network ("The WB"), the network with which the applicants who are filing this coordinated series of petitions/applications (collectively, the "Applicants") have affiliation agreements for some or all of their existing stations. The WB has indicated a willingness to enter

⁴ As indicated in the Petition, the allotment of Channel 49 will provide New Albany with a first local television service, which will promote the objectives of Section 307(b) of the Communications Act of providing a fair, efficient and equitable distribution of television broadcast stations among the various States and communities. 47 U.S.C. §307(b). *See National Broadcasting Co. v. U.S.*, 319 U.S. 190, 217 (1943) (describing goal of Communications Act to "secure the maximum benefits of radio to all the people of the United States"); *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358, 359-62 (1955) (describing goal of Section 307(b) to "secure local means of expression"). In addition, the proposed allotment will promote the second television allotment priority established in the *Sixth Report and Order*, 41 FCC at 167, of providing each community with at least one television broadcast station.

into further affiliation agreements with the Applicants in the event they ultimately obtain licenses for their proposed stations.⁵

As the Commission is well aware, because almost two-thirds of all television markets have only four commercial stations, the ability of any new network to find affiliates is severely limited. The WB has been the fifth, and often the sixth network to enter those top 100 markets in which it has an affiliate. Indeed, The WB has explained to the Commission in a variety of proceedings that its primary challenge in establishing itself as a nationwide network has been finding a sufficient number of stations with which to affiliate.⁶ Therefore, grant of the Petition and the allotment of Channel 49 to New Albany -- in conjunction with the other pending rulemaking petitions which comprise this overall plan -- will help alleviate the need for additional channel assignments because it will permit the Applicants to build new stations with which The WB can develop a primary affiliation and make progress towards achieving national penetration. Although there is no guarantee that Fant's application for the proposed new facility at New Albany will be granted or that the proposed station will ultimately affiliate with The WB, the allotment of Channel 49 to New Albany

⁵ While Fant is inclined to affiliate with The WB in the event its application is granted, there is no commitment on the part of either the Applicants or The WB to enter into such an affiliation agreement. See Petition, ATV Waiver Request, p. 2, n.5; p. 3, n. 9.

⁶ See, e.g., Comments and Reply Comments of The Warner Bros. Television Network, *Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Network and Affiliates*, MM Docket No. 95-92 (Oct. 30, 1995; Nov. 27, 1995); Reply Comments of The Warner Bros. Television Network, *Reexamination of The Policy Statement in Comparative Broadcast Hearings*, GC Docket No. 92-52 (Aug. 22, 1994).

The United Paramount Network ("UPN") has expressed similar difficulties in attempting to establish a nationwide presence. See Comments of the UPN, *Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Network and Affiliates*, MM Docket No. 95-92 at 21-22 (Oct. 30, 1995).

and acceptance of applications for that facility will afford The WB, as well as UPN or any other potential new network, the opportunity to gain an affiliation and thereby strengthen its efforts to obtain a nationwide audience. Therefore, Fant's Petition and concomitant spacing waiver together constitute a request for the Commission to once again waive its mileage separation requirements in order to alleviate the need for an additional channel assignment in a larger television market and thereby foster the development of a new national network.

In light of the substantial public interest benefits which will result from a grant of Fant's Petition, Fant respectfully submits that there is little basis for the Allocations Branch to rigidly apply its general policy of using the center city reference coordinates when (i) Fant has specified a proposed transmitter site in its Petition; and (ii) as the Chief has acknowledged (*see Letter Ruling* at 2), the same Bureau of the Commission utilizes the reference coordinates of an applicant's proposed site in the post-allotment context. This is especially true when the underlying concern -- *i.e., interference* to the short-spaced station(s) -- is the same in both instances. Indeed, the Allocations Branch itself utilizes the reference coordinates of a petitioner's proposed transmitter site in the pre-allotment context when determining whether a proposed allotment is prohibited by the *ATV Order*. *See, e.g., Virginia Beach, Virginia*, 11 FCC Rcd 4715 (Chief, Allocations Branch, 1996).⁷ Furthermore, to the extent it is deemed necessary, it is well within the Commission's

⁷ In the *Virginia Beach*, the Allocations Branch ("Branch") allotted Channel 21 to Virginia Beach despite the fact the reference coordinates of the community were within a "freeze zone" imposed by *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 FR 28346 (published July 29, 1987) ("*ATV Order*"). The Branch held that the allotment of Channel 21 was not prohibited because the reference coordinates of the petitioner's proposed *transmitter site* were located beyond the freeze zone. Accordingly, the Branch allotted Channel 21 to Virginia Beach with a site restriction of 4.0 kilometers south of the community in order to comply with the *ATV Order*. 11 FCC Rcd 4715.

discretion to impose a site restriction on the allotment of Channel 49 to New Albany to ensure that the proposed facility will not cause interference to any other facility. *See, e.g., Wittenberg, Wisconsin*, DA 96-1590 (released September 27, 1996); *Virginia Beach, Virginia*, 11 FCC Rcd 4715.

IV. Conclusion

As demonstrated herein, grant of the instant Petition will serve important public interest objectives such as providing a first local service to New Albany, Indiana, promoting a new national network, and increasing competition in advertising markets. *See VHF Top 100 Markets*, 81 FCC 2d at 253. These benefits constitute substantial contributions to the public interest which outweigh the Commission's interest in "preserving the integrity" of its Television Table of Allotments through the mechanical application of its general policy of using the center city reference coordinates in evaluating rulemaking petitions to allot a new channel. Indeed, Fant's request for waiver is not an attempt to alter the Commission's general policy, but, rather, demonstrates that it contravenes the public interest in this particular instance. *See Id.*, 90 FCC 2d at 166, quoting *Storer Broadcasting Co.*, 14 RR 742, 746-77 (1956). Accordingly, Fant requests that the Chief reconsider his *Letter Ruling* and give Fant's request for waiver of the Commission's general policy of using the reference coordinates of the proposed community the requisite "hard look." *See WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

WHEREFORE, in light of the foregoing, Fant Broadcast Development, L.L.C. respectfully requests that the Chief, Allocations Branch, RECONSIDER his November 4, 1996, *Letter Ruling*, GRANT the Petition for Rulemaking, and ALLOT Channel 49 to New Albany, Indiana, as that community's first local television service.

Respectfully submitted,

FANT BROADCAST DEVELOPMENT, L.L.C.

By: _____

Vincent J. Curtis, Jr.

Andrew S. Kersting

Its Counsel

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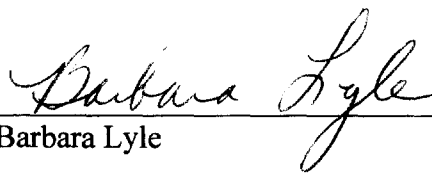
December 4, 1996

CERTIFICATE OF SERVICE

I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 4th day of December, 1996, copies of the foregoing "Petition for Reconsideration" were hand delivered to the following:

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Barbara Lyle